

April 23, 2015

Jeff S. Jordan  
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Federal Election Commission  
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Date: 2015.07.16 13:18:55 -0400

Re: MUR 6916

Dear Mr. Jordan:

We write as counsel to the Democratic Senatorial Campaign Committee ("DSCC") and Deanna Nesburg in her official capacity as Treasurer, and the respondents identified on Attachment A (the "Campaign Respondents"),<sup>1</sup> in response to the complaint filed by the Foundation for Accountability and Civic Trust on February 16 (the "Complaint").

The Complaint was filed against 399 different respondents, and alleged no conduct by any of them that would have violated the Federal Election Campaign Act of 1971, as amended ("the Act") or Commission rules. The crux of the Complaint is that Catalist, LLC provided services at less than the normal and usual charge and served as a common vendor in violation of the coordination rules. But only one Respondent even contracted with Catalist. The rest appear to have been named solely because they disclosed disbursements to NGP VAN, LLC, a vendor which, among other things, is a common provider of FEC reporting software to Democratic political committees.<sup>2</sup>

The sweeping nature of the Complaint and its lack of any basis in law or fact suggest that its purpose is to harass—and it has had just that effect. Many of the Campaign Respondents are winding down and the pendency of this Complaint prevents them from terminating, causing them unnecessary expense and inconvenience. The Complaint should be promptly dismissed and the Commission should close the file.

### Legal Analysis

"The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."<sup>3</sup> Additionally,

<sup>1</sup> All respondents shall be referred to collectively as "Respondents."

<sup>2</sup> See, e.g., Advisory Opinion 2004-24.

<sup>3</sup> Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, MUR 4960 (Dec. 21, 2000).

“unwarranted legal conclusions from asserted facts” and mere speculation will not be accepted as true.<sup>4</sup>

The Complaint makes two allegations: first, that Catalist, LLC (“Catalist”) made improper in-kind contributions to Respondents by charging them less than the normal and usual charge for its services and, second, that Catalist served as a common vendor to Respondents and certain unidentified outside groups in violation of the coordination rules. Both allegations fail to meet this standard and, therefore, must be dismissed.

### **I. Respondents Paid the Normal and Usual Charge for the Services Rendered**

The Complaint alleges that Catalist made in-kind contributions to Respondents by charging them less than the normal and usual charge for its services. This claim is purely speculative and without basis. Only one Respondent, the DSCC, retained Catalist between 2010 and the present.<sup>5</sup> The DSCC retained Catalist from 2009 through 2010, and again in 2014, to provide it with voter data subscriptions.<sup>6</sup> As with the DSCC’s other business dealings, the terms of the DSCC’s agreements with Catalist were negotiated at arm’s length between the parties, and the DSCC paid Catalist over \$250,000 for services rendered in 2010 and over \$50,000 for services performed during just two months in 2014. The size of these fees is flatly inconsistent with a supposed “little interest in making a profit.”<sup>7</sup>

In any case, the Complaint alleges no information to show that the DSCC was undercharged. It fails to present any gap between what a similarly situated consumer would have paid, and what the DSCC actually paid.<sup>8</sup> Rather, it relies entirely on two “blind” quotes from a book that assert conclusorily that Catalist “has little interest in profits” and was “more interested in keeping its prices down to help partisan and ideological allies.”<sup>9</sup> This kind of hearsay -- “citing an unidentified source’s statement that itself lacks any indicia of reliability -- is not adequate support for a finding of reason to believe that the Act has been violated.”<sup>10</sup> In any case, the only test is whether Catalist actually charged its clients the normal and usual charge—a matter on which the Complaint is entirely silent.

<sup>4</sup> *Id.*

<sup>5</sup> According to the disclosure reports filed with the Commission, none of the Campaign Respondents reported making disbursements to Catalist between 2010 and the present. See [www.fec.gov](http://www.fec.gov). Though the Campaign Respondents did retain NGP VAN, LLC, the Complaint does not allege that NGP VAN provided services at less than the normal and usual cost, nor does it provide any facts that would support such a contention. See Complaint at 24-25.

<sup>6</sup> The Complaint fails to specify when, precisely, the violations alleged therein would have occurred. As claims accruing more than five years ago are barred by the statute of limitations, this response only addresses activity that occurred from 2010 to the present. 28 U.S.C. § 2462.

<sup>7</sup> Complaint at 24.

<sup>8</sup> See 11 C.F.R. § 100.52(d)(2).

<sup>9</sup> Complaint at 20.

<sup>10</sup> First General Counsel’s Report, MUR 6506, at 5 (Feb. 15, 2013).

## II. Respondents Did Not Receive In-Kind Contributions in the Form of Coordinated Communications

The Complaint also alleges that Catalist served as a “common vendor” that made available Respondents’ “client lists and voter data files” to unspecified outside groups. Accordingly, the Complaint alleges, these unspecified outside groups may have made unspecified coordinated communications that should have been treated as in-kind contributions to Respondents.

Under Commission rules, to constitute a “coordinated communication,” a public communication must meet three prongs. First, it must be paid for by a person other than the candidate, authorized committee or political party committee with which it is coordinated. Second, it must satisfy one or more content standards. Third, it must satisfy one of several conduct standards.<sup>11</sup>

The Complaint fails to allege specific facts to support a finding that any one of these prongs has been met. It does not point to a single specific communication that was paid for by a third party group. Nor does it identify the content of any such communication, or even when such a communication may have been distributed. In fact, for a number of Respondents, no outside groups reported making *any* independent expenditures or electioneering communications during the 2014 election cycle.<sup>12</sup>

Moreover, there is no factual or legal basis to find that the conduct prong was met. The Complaint asserts that Catalist served as a “common vendor” to both Respondents and outside groups. But merely sharing the same vendor is not a violation of the Act, nor does it create a presumption of coordination.<sup>13</sup> Instead, a vendor is a “common vendor” under the rules only if the vendor’s “usual and normal business includes the creation, production, or distribution of communications”<sup>14</sup> and “the same vendor creates or distributes the ad alleged to be coordinated and, within 120 days, has provided specified services for the candidate alleged to have benefitted from the coordination.”<sup>15</sup> Furthermore, the vendor must have used material nonpublic information about the candidate or party committee’s plans, projects, activities or needs, or information used previously in providing services to the candidate or party committee, in creating, producing or distributing the ad, or conveyed such information to the person paying for the communication.<sup>16</sup>

<sup>11</sup> 11 C.F.R. § 109.21(a)

<sup>12</sup> See [www.fec.gov](http://www.fec.gov). For example, there were no independent expenditures or electioneering communications reported supporting David M. Alameel for United States Senate, Stephen Lynch for Senate, Pallone for Senate, or the Reed Committee, to name a few.

<sup>13</sup> See *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

<sup>14</sup> *Id.* at 436.

<sup>15</sup> First General Counsel’s Report, MUR 6077, at 7 (Apr. 20, 2009); 11 C.F.R. § 109.21(d)(4).

<sup>16</sup> See 11 C.F.R. § 109.21(d)(4)(iii).

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As described above, the Campaign Respondents did not retain Catalist between 2010 and the present, so Catalist was not a vendor to those committees. Though the DSCC did engage Catalist, Catalist was not a "common vendor" under the Act. According to its own website, Catalist does not appear to create or distribute communications in the normal course of its business,<sup>17</sup> and the Complaint does not allege anything to the contrary.<sup>18</sup> Moreover, the DSCC took the same steps with Catalist as it does with its other vendors to ensure that its nonpublic information was kept confidential and not used by Catalist in its work with its other clients. Thus, there is no basis to find that Catalist served as a "common vendor" under the rules or that Catalist improperly used or shared DSCC information.<sup>19</sup>

The complaint also makes the vague and unsourced allegation that Catalist and NGP VAN have "joined forces," leading to the sharing of information in violation of the coordination rules.<sup>20</sup> While the Campaign Respondents did retain NGP VAN, the Complaint still fails to allege any specific facts with respect to NGP VAN that would trigger the conduct prong of the coordination rules. As described above, merely acting as a common vendor is not a violation of the Act, nor does it serve as prima facie evidence of coordination. The Complaint fails to allege any specific facts that show that NGP VAN created or distributed communications for outside groups, that show the actual transfer of information from Respondents to those outside groups, or that show that such information was material to any communication made by an outside group. And, as discussed earlier, for a number of Respondents, there were not even reported independent expenditures or electioneering communications during the 2014 election cycle. Without such facts, the Commission may not find reason to believe.<sup>21</sup>

Lastly, even if the Complaint alleged that Catalist or NGP VAN used or conveyed Respondents' nonpublic information, the Complaint still would not allege a violation by Respondents. Under the rules, if a common vendor uses such information to create, produce, or disseminate a communication paid for by a third party, or conveys such information to the third party, the third party will have *made* an in-kind contribution in the form of a coordinated communication.<sup>22</sup> But

<sup>17</sup> See Catalist, Products, [www.catalist.us/product/product.html](http://www.catalist.us/product/product.html) (failing to identify communication production, creation or distribution services as among its products).

<sup>18</sup> MUR 6077, at 8.

<sup>19</sup> See, e.g., First General Counsel's Report, MUR 6570 (Oct. 22, 2012) (declining to pursue enforcement where there were no "allegations of specific conduct" that a common vendor used or conveyed nonpublic campaign information). The only "fact" that the Complaint cites to support its "common vendor" argument is an unsourced statement in *The Victory Lab* that, over seven years ago, a different committee was able to access voter registration information that had been collected by an outside group before the voter's application had been officially processed. Complaint at 22. This type of unsourced hearsay is inadequate to support a finding of reason to believe. First General Counsel's Report, MUR 6506, at 5. And even if it were, it shows no transfer of nonpublic information from a campaign or party committee to an outside group, but rather the reverse, which satisfies none of the conduct standards under the coordination rules. See 11 C.F.R. § 109.21(d).

<sup>20</sup> Complaint at 26.

<sup>21</sup> See First General Counsel's Report, MUR 6570; First General Counsel's Report, MUR 6077, at 7.

<sup>22</sup> 11 C.F.R. §§ 109.21(c)(4).

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the campaign or party committee does not *receive* an in-kind contribution unless it requests or suggests that the third party make the communication, is materially involved in decisions regarding the communication, or has substantial discussions with the third party in which it disclosed nonpublic and material information about its plans, projects, activities or needs.<sup>23</sup> And there is no basis to conclude that any of these other conduct standards have been met. Accordingly, the Complaint must be dismissed.<sup>24</sup>

### Conclusion

For the reasons described herein, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



Marc Erik Elias  
Andrew H. Werbrock  
Counsel to Respondents

<sup>23</sup> *Id.* §§ 109.21(b)(2), 109.37(a)(3).

<sup>24</sup> In addition to the reasons contained herein, the complaint should be summarily dismissed as to Stephen Lynch for Senate and Domina for Nebraska Inc., because these committees have terminated in the normal course. *See* 52 U.S.C. §§ 30101(11), 30109(a); *see also* First General Counsel's Report, MUR 6638, n.21 (Oct. 25, 2013).

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**Attachment A**

David M. Alameel for United States Senate and David Pulling, Treasurer  
Alaskans for Begich 2014 and Connie Sanders, Treasurer  
Bellows for Senate and Daniel Hildreth, Treasurer  
Cory Booker for Senate and Scott Kobler, Treasurer  
Braley for Iowa and Theresa Kehoe, Treasurer  
Childers for Senate Inc. and Marilyn Jones, Treasurer  
Chris Coons for Delaware and Judith Zamore, Treasurer  
Amanda Curtis for Senate and Mary Sexton, Treasurer  
Domina for Nebraska, Inc. and Fred A. Lockwood, Treasurer  
Friends of Dick Durbin and Douglas Dougherty, Treasurer  
Al Franken for Senate 2014 and Thomas Borman, Treasurer  
Alison for Kentucky and Robert C. Stolz, III, Treasurer  
Hagan for U.S. Senate, Inc. and Dwight Davidson, Treasurer  
Rush Holt for Senate and Robert J. DelTufo, Treasurer  
Friends of Mary Landrieu Inc. and Nancy Marsiglia, Treasurer  
Stephen F. Lynch for Senate and Brian Miller, Treasurer  
The Markey Committee and Marie Carbone, Treasurer  
Jeff Merkley for Oregon and Elise Greene, Treasurer  
Nelson 2012 and Jessica Lathrop, Treasurer  
Nunn for Senate Inc. and James Grien, Treasurer  
Peters for Michigan and Geraldine Buckles, Treasurer  
Mark Pryor for U.S. Senate and Bob Edwards, Treasurer  
The Reed Committee and Judith Zamore, Treasurer  
Schatz for Senate and Keith Amemiya, Treasurer  
Shaheen for Senate and Michelle L. Chicoine, Treasurer  
Natalie Tennant for Senate and Arden J. Curry II, Treasurer  
Udall for Colorado and Ellen Marshall, Treasurer  
Udall For Us All and Carolyn Gonzales, Treasurer  
Friends of Mark Warner and Gerald McGowan, Treasurer.